Tri-County Manufacturing and Assembly, Inc. *and* United Steelworkers of America, AFL–CIO, CLC. Cases 9–CA–37528, 9–CA–37559, 9–CA–37754–4, and 9–CA–37837–2

August 27, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On May 7, 2001, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tri-County Manufacturing and Assembly, Inc., Williamsburg, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified below.

1. Add the following as new paragraph 1(a) and reletter the subsequent paragraphs.

"(a) Suspending or discharging its employees because of their protected concerted activities."

2. Add the following as new paragraph 2(d) and reletter the subsequent paragraphs.

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman,	Member
John C. Truesdale,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend or discharge any of you because of your protected concerted activities.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the dismissal of the 8(a)(1) and (3) allegations concerning employee William Hamilton.

We affirm the judge's finding that the Respondent's suspension and discharge of Robert Moore violated Sec. 8(a)(1) of the Act. We find it unnecessary, however, to decide whether the Respondent's actions violated Sec. 8(a)(3) as well as Sec. 8(a)(1), see *NLRB v. Burnup & Sims*, 379 U.S. 21, 22 (1964), because the finding of an 8(a)(3) violation would not affect the remedy. *Webco Industries*, 327 NLRB 172, 172 (1998); *Ideal Dyeing & Finishing Co.*, 300 NLRB 303, 303 fn. 5 (1990), enfd. 956 F.2d 1167 (9th Cir. 1992). Accordingly, we have made corresponding changes to the Order and notice.

[2] The judge inadvertently omitted from his recommended Order a records preservation provision. We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (Aug. 24, 2001). We will also insert in the notice the provision stating that the Respondent will not in any like or related manner interfere with, restrain, or coerce its employees in the exercise of rights guaranteed by Sec. 7.

WE WILL NOT threaten our employees that the Company will cease to exist, depart, or not exist in Williamsburg, or with related reprisals, if they become unionized.

WE WILL NOT tell our employees that we will never sign a union contract.

WE WILL NOT dare employees to come forward to state facts in support of an unfair labor practice charge, or otherwise coerce or intimidate employees who may have information regarding an unfair labor practice charge.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Moore full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Moore whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Robert Moore, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

TRI-COUNTY MANUFACTURING AND ASSEMBLY, INC.

Naima R. Clarke, Esq., for the General Counsel.
Thomas C. Fenton, Esq. (Morgan & Pottinger, P.S.C.), of Louisville, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Corbin, Kentucky, on January 23 and 24, 2001. The United Steelworkers of America, AFL-CIO-CLC (the Union) filed the charges against Tri-County Manufacturing and Assembly, Inc. (the Respondent or TCA), on March 31, 2000, April 13, 2000, July 14, 2000, and July 31, 2000. The charge filed on April 13, 2000, was subsequently amended on May 19, 2000. The Regional Director for Region 9 of the National Labor Relations Board (the Board) issued the consolidated complaint and notice of hearing on September 27, 2000, and the second consolidated complaint and notice of hearing (the complaint) on November 14, 2000. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by threatening plant closure and making other coercive statements that interfered with employees' exercise of their organizational rights. The complaint also alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging one employee and issuing a warning to another because those employees had engaged in union and protected concerted activity. The Respondent filed an answer in which it denied that it committed any violation of the Act. The General Counsel and the Respondent filed posthearing briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures electronic components and other items at a facility in Williamsburg, Kentucky. During the 12-month period prior to the issuance of the second consolidated complaint, the Respondent purchased and received goods at its Williamsburg facility valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the United Steelworkers of America, AFL-CIO,CLC, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent's primary business is placing components on electronic boards. The Respondent also performs circuitry design work and assembly work. Between 400 and 500 individuals work at the Respondent's facility in Williamsburg, Kentucky. That facility has two main buildings, which are referred to as building one and building two. Bill Barefoot has been the Respondent's president since he started with the Company on January 1, 1998. Jim Walker has worked for the Respondent for approximately 20 years in management positions, including that of general manager, and is currently a plant manager. The Respondent's employees have never been represented by a Union. In January 2000, the Union began an effort to organize the work force at the Respondent's Williamsburg facility.

1. March 2000 general meetings

The Respondent's president, Bill Barefoot, found out about the union campaign in the early part of March 2000. According to Barefoot, an employee came "bursting" and "flying" into his office "very nervous and very excited" and said "when are you people going to do something about these people out there trying to unionize TCA." ((Tr. 217.) Barefoot testified that the employee urged that "[s]omebody needs to get out there and let these people know the company's position on unions." Id.

On March 20 and 21, 2000, Barefoot and Jim Walker, a plant manager, conducted general meetings of its employees. Each of these meetings was attended by between 100 and 200 employees and most or all of the employees attended one of the meetings and heard essentially the same presentations. At least one of these meetings occurred in building one, and at least one

occurred in building two. The meetings each lasted approximately an hour and a half and focused on unions and the organizing campaign, although a number of other subjects were discussed.

Barefoot spoke first, then Walker made a presentation, and then Barefoot spoke again before closing the meeting. There were no other presenters. Barefoot began by discussing topics not directly related to the Union. He told the employees that plans to construct a third building had been placed on hold due to an announcement by a major customer, that new parking lot security/surveillance measures had been taken, and that the Respondent viewed itself as a "contract manufacturing company" to whom customers were "king."

Then Barefoot stated that "some people want to divide us and make two groups." Those people, Barefoot testified, were "a group of employees" that "were out there talking Union." ((Tr. 224.)[1] Barefoot advised the employees to "beware of those people that all of a sudden had an axe to grind." Id. Barefoot told the employees that when he was a manager with Proctor Silex one of the plants was represented by the United Steelworkers of America (the same union involved here). Barefoot stated that, during contract negotiations, the union had told the employees to "hold off, we can get you better and [the company will] give in." Instead of giving in, Barefoot recounted, the Company had asked him if he could move the plant in 90 days. Barefoot stated that it ended up taking only 60 days to move the plant. Barefoot opined that employees should ask themselves three questions about the Union: "Do these people have the ability or resources to offer you continuous employment? Are they telling you the truth? What's in it for them?" Barefoot stated that the Respondent's "commitment" to employees "is to not have layoffs."

Barefoot yielded the floor to Walker, who talked for approximately one hour. Walker's presentation was limited to topics relating to unions and the union campaign. He remarked that unions could not help the situations at any of the companies in the area. He said that companies, not unions, provide jobs, and that while unions could not provide jobs, they could and would require employees to pay dues, fines, and assessments. He told the assembled employees that when he worked at a unionized facility in the past, the union had forced him to terminate two employees because those employees had not paid a 50-cent assessment. Unions, Walker stated, "will tell you anything to sign up." He told the employees that when he was a manager at Elicon, a company that formerly had a unionized plant in the area, there had been a 7-month strike that led to gun violence and that the company had closed the plant on his recommendation. He said that during the strike the union had lied to employees about the company's willingness to negotiate and had refused to permit employees to vote on a contract. He stated that in his view the purpose of the international union involved had been to shut down the company. Walker also noted that NCR, U.S. Steel, and Ropers had been unionized facilities and that all were gone from the area. National Standard, he said, was also unionized and had reduced its work force from several hundred employees to only 25 employees. At trial, Walker admitted that he did not know whether unions had any part in NCR, U.S. Steel, Ropers or National Standard closing or reducing their work forces, but he testified that he pointed out to employees that the unions had not protected the jobs of employees with those companies. Walker told the employees at a meeting in building two that the Respondent would "depart" if the union campaign were successful. During a presentation he gave in building one, Walker stated that if the union came in "TCA would not exist in Williamsburg." At one or more of the meetings Walker stated that the rumors that employees would not have to work involuntary overtime if the Union came in were untrue. He told the employees that a union does not control "something like that."

After Walker concluded his presentation at each meeting, Barefoot spoke again. Barefoot stated that in the past unions had helped workers by getting laws passed and that those laws now provided recourse to aggrieved workers. He asked people to raise their hands if they had worked at Elicon, Ropers, NCR, or National Standard—four companies that had unions and had either closed or reduced their work forces dramatically. Barefoot testified that his purpose in bringing up these companies was to suggest that each employee "ask yourself why are they not here." At one of the meetings he asked an employee who had worked at all four facilities to publicly state why he believed that the companies had closed or left the area, and the employee responded, "Because of unions and their demands." Barefoot told the employees that if "if the Union got in, there would be no more TCA."

Credibility: The above account of the general employee meetings in March 2000 is largely consistent with Barefoot's and Walker's own testimony regarding what they said. My findings diverge from their testimony to the extent that I find that Barefoot said that "if the Union got in, there would be no more TCA," and that Walker said that if the Union got in the Respondent would "depart" and that it "would not exist in Williamsburg." Both Barefoot and Walker categorically denied making these statements or threatening that the plant would close if the union campaign was successful. Their testimony was supported by that of two of the Respondent's management officials, Greg Finley (a plant manager) and Darren Steely (human resource's director), who also attended the meetings. On the other side, the General Counsel presented the testimony of five employees who each attended one of the general meetings in March 2000. These witnesses testified that Barefoot and/or Walker had made some version of the statements regarding plant closure that I find above. For the reasons discussed below, I found the testimony of the five employees more credible than that of the management witnesses who testified regarding the statements.

I found Barefoot to be lacking in credibility based on his demeanor and testimony. Barefoot demonstrated a willingness

[1] During his subsequent testimony, Barefoot directly contradicted himself and claimed that the subject of "some people" who "want to divide us," "has nothing to do with the Union." ((Tr. 245; R Exh. 11.) This was not credible given Barefoot's prior testimony, and also given the fact that Barefoot offered no substitute explanation for the remark. I believe that Barefoot intentionally misrepresented the meaning of his "some people want to divide us" comment in an effort to minimize the union-related content and purpose of the meeting. This undercuts his credibility in denying other union-related statements.

to shade or misrepresent facts in order to favor the Respondent's position. For example, when the General Counsel attempted to demonstrate that most of Barefoot's presentation related to unions, Barefoot disagreed and claimed that the sixth subject on his outline—i.e., that "some people want to divide us"—had "nothing to do with the Union." ((Tr. 245; R Exh. 11.) However, when he was asked to explain that same comment during earlier questioning by his own attorney, Barefoot stated that he was talking about the "group of people" who were "out there talking union." (Tr. 224.) See also fn. 1, above. Barefoot also testified that when he reminded employees that NCR had closed he did not know the reason for the closure and did not mention that NCR had a union. During the trial, the General Counsel asked Barefoot whether he knew that NCR had a union and Barefoot responded ambiguously that "I may have been told that." (Tr. 249.) However, Barefoot earlier testified unambiguously that when he gave his presentation he *was* aware that NCR had a union (Tr. 230), and, in any event, Walker had previously stated during those meetings that NCR was unionized (Tr. 292). Moreover, it was disingenuous of Barefoot to claim that he may not have been aware that NCR was unionized when the purpose of this part of his presentation was to remind employees about unionized plants in the vicinity that had closed or laid off employees after "demands were made . . . that economically they could not afford." Given Barefoot's demonstrated willingness to give less than candid testimony in order to minimize the union-related content of his presentation, as well as his demeanor, I deem his denial of the statements regarding plant closure to be unreliable.[2]

I also found the other management witnesses to be less than fully credible. Finley testified that he attended the general meetings in March 2000, and that neither Barefoot nor Walker had told employees that if the Union came in the plant would close. However, Finley also denied remembering that unions were discussed at that meeting *at all*. (Tr. 172.) He stated that his recollection was that the meetings concerned the Respondent's "business at it stands." (Tr. 171.) However, unions not only were discussed at the meeting, but they were the subject of Walker's entire hour-long talk, and were discussed at length by Barefoot. I find Finley's denial that he remembered unions being discussed at the meeting to be telling. It suggests that Finley wished to avoid discussing any aspect of the meeting that could undercut the Respondent's position. I found Finley lacking in credibility based on his demeanor and testimony.

I also found Steely's statements that Barefoot and Walker did not say that the plant would close if the Union came in to be lacking in credibility based on his demeanor and testimony. Steely, as human resources manager, was intimately involved in the Respondent's opposition to the union effort,[3] and cannot be assumed to be a completely disinterested witness. In addition, although unions and the organizing effort were the focus of the March meetings, Steely testified that the "gist" and "main purpose" of the meetings was the Respondent's business and certain customers, not unions. (Tr. 195.) Steely's mischaracterization of the "gist" of the meeting demonstrates a willingness on his part to give less than candid testimony. I found Steely to be a less than fully credible witness based on his demeanor, evasiveness,[4] testimony, and the totality of the evidence. I also found Walker to be a less than fully credible witness based his demeanor, testimony, and the totality of the evidence. As one of the alleged wrongdoers in this case, Walker cannot be presumed to be a disinterested witness and his testimony suggests that he was willing to shade his testimony to favor the Respondent. As part of an effort to buttress his claim that he never said that the Respondent would "depart," Walker testified that he did not "go outside" his prepared outline for the presentation, which did not include such a statement. However, when it favored the Respondent's position Walker testified that he did make statements that are not included in his outline. For example, he testified that he told the group that after he terminated two employees for not paying a 50-cent union assessment, a charge was filed and that the Company had been required to reinstate the terminated employees and give them backpay. However, the outline makes no mention of the charge, or of the reinstatement with backpay. No other witness, on either side, testified that Walker had revealed that these discharges, which Walker mentioned in an effort to discourage union participation, were found unlawful and reversed.[5]

Three of the General Counsel's witnesses—William Hamilton, Elderada Miller, and Jeanetta Earls—testified that they heard Barefoot say that if the Union came in there would be "no TCA." (Tr. 32, 121, 132, 138.) A fourth witness, Robert "Sammy" Moore, remembered that Barefoot said, "if the union was voted in TCA would close the doors." (Tr. 18.) A fifth witness—Faye Anderson—testified that Barefoot said, "TCA would not operate under a union." (Tr. 142). Four of the General Counsel's witnesses—Moore, Hamilton, Miller, and Anderson—testified that Walker either said the Respondent would "depart" or that it "would not exist" in Williamsburg if the union campaign were successful. (Tr. 17, 31, 120, 143, and 147.) None of these witnesses significantly contradicted themselves while testifying, and as a group their testimony was substantially consistent regarding the key points. I found the tes-

[2] A written outline that Barefoot prepared of his talk was received as R. Exh. 11. This outline does not include a statement that there would be "no more TCA" if the organizing campaign were successful. R. Exh. 11. Based on the credible testimony of witnesses who stated that that Barefoot did make such a statement, I conclude that Barefoot's actual remarks went beyond those specifically listed in his outline.

[3] After the Respondent found out about the organizing campaign, Steely and Barefoot had a phone conference with one of its attorneys about what supervisors could and could not do in response to the campaign. The attorney sent the Respondent a document giving advice on how to respond to the union campaign and Steely was responsible for distributing this information to supervisors. (Tr. 218; R Exh. 10.)

[4] See, for example, (Tr. 84-86) (evasive testimony about whether Tonya Monholland was warned, not terminated, for infractions committed as of February 17, 2000).

[5] I also note that the Respondent did not present the testimony of a single nonmanagement/nonsupervisory witness to corroborate Barefoot's or Walker's accounts of what was said at the March meetings. Approximately 400 employees attended these meetings. Given that, it is telling that not one statutory employee corroborated Barefoot's and Walker's denials that they told employees the plant would close if the employees unionized.

timony of these witnesses about statements regarding plant closure to be generally credible.[6] I considered Miller to be the most credible of all the witnesses on the subject of whether Barefoot and Walker made the disputed statements. Miller has been employed by the Respondent for 20 years and was not shown to be a union official or supporter, or to have any other motive to give biased testimony in this proceeding. Miller testified that she heard Barefoot state that "if the Union came in there would be no more TCA," and heard Walker state that if the Union came in the Respondent would "depart." There were no meaningful inconsistencies in Miller's testimony. I was impressed with Miller's demeanor, which was forthright, clear, and certain, and found her an extremely credible witness. I also found quite credible the testimony of Faye Anderson, who, like Miller, was a long-time employee of the Respondent and was not shown to have any motive to give biased testimony. Given Anderson's demeanor, the lack of evidence of bias, and the record as a whole, I have credited Anderson's testimony that Barefoot said the Respondent "would not operate under a Union" and that Walker said the Respondent would "depart." It is true that Anderson had trouble remembering a number of the topics that Barefoot and Walker spoke about. However, I do not consider it implausible that Anderson, or other witnesses, would remember that threats of plant closure were made, but fail to recall less dramatic and intimidating aspects of the same meeting.[7]

2. The June 2000 meeting

By June 2000, the Union had filed a number of charges against the Respondent, including one alleging that the Respondent threatened to close the plant if the union came in. On about June 22, 2000, Barefoot conducted a meeting of employees in the building two. This meeting was attended by approximately 8 to 10 employees, including Hamilton, a machine operator who was one of the Union's most visible supporters.[8]

Barefoot began this meeting by showing a "power point" presentation that he used with prospective customers and by discussing a number of matters relating to the Respondent's business. Towards the end of the meeting, Barefoot gave an update on the union activities. He stated that the Respondent would be posting the charges that had been filed against it, and the Company's responses, on the bulletin board so that the employees could examine them. Commenting on the charges, Barefoot said that it was not true that Walker had said that if the Union came in the plant would close, and that people "just heard what they wanted to hear." Hamilton responded that he had heard Walker say that the plant would depart and that others had heard Walker make the statement as well. Then Barefoot stated that he "dared" others to step forward and say that Walker had made the disputed statements.

As Hamilton was exiting the area after the meeting, he commented to Barefoot that the presentation had concerned contracts with customers, and that is all "we want," a contract with the Respondent. Barefoot responded that the Respondent would not enter into a contract with the Union.

Credibility: The above findings regarding what was said about the Union during the June meeting are based largely on the testimony of Matthew Taylor, a former employee who attended the meeting. Taylor's version of what transpired at the June meeting is also largely consistent with Hamilton's account, although Hamilton also claimed that Barefoot characterized the allegations involving Walker as a "lie"—an allegation that was contradicted by Taylor as well as Barefoot, and which I reject.

Barefoot 's account of what was said about the Union at the June meeting differed in significant respects from Taylor's and Hamilton's. Barefoot denied initiating a discussion of the merits of any of the charges, and also denied that he "dared" other employees to come forward. He also denied stating that the Respondent would not enter into a contract with the Union. According to Barefoot's account, he informed the employees that the Respondent would be posting the charges and then Hamilton simply announced that he heard Walker say that if the Union came in they would close the plant down. Barefoot testified that he responded that Walker had "never said such a thing." According to Barefoot's account, Hamilton responded "I've got three or four people that can stand up and say he did say it," and Barefoot replied that the company had "500 other people that would stand up and say it wasn't said." Barefoot said he answered Hamilton's comment about wanting a contract by asking Hamilton what benefit employees would get from a contract. In Barefoot's account, Hamilton simply reiterated that "we just want a contract," and Barefoot responded "that's up to the employees to decide."

For reasons already discussed, I did not find Barefoot a credible witness regarding disputed matters. I also considered Hamilton a somewhat unreliable witness given his demeanor, testimony and the record as a whole. Hamilton's memory was flawed regarding a number of details of the relevant events and I had the impression that his emotional agitation during those events may have colored or clouded his recollection of them. I found Taylor the most credible of the three witnesses who testified regarding the June meeting. He showed no inclination to exaggerate to favor either side in the dispute. For example, when asked whether Barefoot had characterized the allegation of threats of plant closure as a "lie," as Hamilton had claimed, Taylor denied that Barefoot had done so. Rather he testified that Barefoot had made the less inflammatory statement that

[6] I note that two of those witnesses, Moore and Hamilton, were union supporters who were the subjects of disciplinary actions that are being challenged in this proceeding. As with Barefoot, Walker, Finley, and Thomas, I do not presume that Moore and Hamilton are wholly disinterested witnesses. A third witness for the General Counsel, Jeanetta Earls, was not shown to be an active union supporter, but she had recently been disciplined for visiting other employees during worktime.

[7] My credibility findings with respect to Hamilton, Earls, Miller, and Anderson are made independently of the fact that they were working for the Respondent at the time they testified. I nevertheless note that these findings are consistent with the Board's view that the testimony of a current employee that is adverse to his employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977); see also *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996).

[8] Hamilton testified without contradiction that he began wearing shirts with union insignias before any other employees did so, and that he was wearing one at the June 2000 meeting.

people had "heard what they wanted to hear." In addition, even though Taylor resigned voluntarily, on direct examination he admitted without prompting that he had felt some pressure from the Respondent to leave. In addition, I found Taylor's account more plausible than Barefoot's. For example, Barefoot claimed that he had not commented on the validity of the charges and that Hamilton simply declared that he and others had heard Walker make a threat of plant closure. However, I consider it doubtful that Hamilton would make such a statement except, as Taylor testified, in response to some statement in Barefoot's presentation that the charge was not true.[9] Based on Taylor's demeanor and testimony I have credited his account.

3. Disciplinary actions

a. Robert "Sammy" Moore

Robert "Sammy" Moore first worked for the Respondent from 1995 to 1998, and then was rehired in August 1999 and worked until he was terminated effective April 3, 2000. At the time of his termination, Moore was classified as a material handler, and his duties included purchasing parts, receiving parts, delivering parts, and storing parts. Prior to the incident that led to his termination, Moore was considered a good employee by his supervisor, Mark Thomas. While delivering parts, Moore talked to other employees about a variety of subjects, sometimes in the presence of supervisors, and had never been disciplined for this by the Respondent.

Moore found out about the organizing campaign in February 2000. He testified that he supported the organizing campaign by, in his words, "ask[ing] people their opinions." At no point during his employment with the Respondent did Moore ever wear any union paraphernalia or otherwise identify himself as being involved with, or supportive of, the Union. There was no evidence that, during his employment with the Respondent, Moore was a union official, carried out any instructions from the Union, or informed the Union of any of his activities. Moore's father and some of his other relatives were members of unions and Moore remembered hearing from them that "if the Union was voted in and cards were passed out and you did not sign a card that you could be fired."

On March 29, 2000, at approximately 8 a.m., Moore was at the workstation of Johnny Draper, a machine operator. Draper was at his machine and Moore was delivering parts. On this occasion Moore asked Draper, "How do you feel about the Union?" Draper responded that "if they handed out cards, I'd hand them back an empty one." Then Moore stated "[w]ell, I hear that . . . if the Union was voted in and the cards was passed out and you didn't sign one, you was fired." Draper again told Moore that "he'd just hand them back an empty one." Moore perceived that the conversation was "bothering" Draper and so Moore stopped talking and left. This was the only conversation that Moore had with Draper on the subject of the union. At no point did Moore actually attempt to present a union card to Draper or ask him to sign one. Nor did Moore suggest that he was speaking for, or on behalf of, the Union or any union official.

Later that day, Draper told Thomas what Moore had said to him and Thomas then summoned Moore to a meeting in the office of Greg Finley, a plant manager. The meeting was attended by Moore, Thomas, and Finley. When asked about it, Moore readily admitted what he had said to Draper.[10] Finley told Moore that the Respondent would "not tolerate threatening and harassing other employees over the Union." Moore apologized and said that he "didn't realize" he had been "threatening or harassing." That same day, Finley issued Moore a 3-day suspension "pending termination." Then Finley and Thomas had a conversation with Steely about the incident. Steely, Finley, and Thomas concluded that Moore had violated section 15.3, subsection 8, of the Respondent's employee handbook. Section 15.3 provides that "an employee may be subject to immediate discharge" for 29 separate types of violations, including, under subsection 8, "[t]hreatening, intimidating, coercing or interfering with fellow employees." (R Exh. 2, p. 32.) Finley, Thomas, and Steely decided that Moore would be terminated for the offense. Before giving their decision effect, Steely discussed the matter with Barefoot, who opined that the Respondent had "no choice but to follow . . . Company policy" and terminate Moore. On April 3, 2000, Thomas completed a termination report stating that Moore had threatened another employee and that "[t]his is cause for immediate termination per Section 15.3, Subsection 8." Finley informed Moore of the discharge.

[9] As the General Counsel points out in its brief, the Respondent's position regarding the charges was not posted until after the meeting, and therefore, Hamilton's statement could not have been made in response to that posting. GC Br. at 15.

[10] Moore testified that what he said to Draper, and what he admitted to saying, was "[w]ell, I heard that . . . if the Union was voted in the cards was passed out and you didn't sign one, you was fired." According to Finley and Thomas, Moore admitted to telling Draper that if an employee did not sign a union card, and the Union came in, that the employee could be fired. Although the two versions are facially similar, Moore's version does not carry the same threatening import as the version reported by Finley and Thomas. First, in Moore's account he was only reporting "what he heard" would happen, and not making a statement of something he knew would happen, and certainly not of something he himself would, or could, cause to happen. Second, in Moore's account, what he said to Draper suggested that an employee could wait and see if the union campaign were successful before deciding whether to sign a union card. The version given by Finley and Moore indicates that employees who wanted to keep their jobs would have to sign a union card prior to the election, thus creating pressure on employees to express preelection support for the union regardless of their true feelings, and possibly influencing the outcome of the organizing campaign.

I credit Moore's account of precisely what he said to Draper. Draper was not called to testify and there was no testimony, other than Moore's, by any witness to Moore's conversation with Draper. The testimony is in conflict, however, regarding what Moore *admitted* to during his meeting with Finley and Thomas. There may have been some actual confusion among Moore, Finley, and Thomas, regarding the precise statements that Moore admitted to. It may be that Finley and Thomas believed that Moore had admitted to telling Draper "that if [employees] did not sign a union card, and the Union came in to TCA, they would be fired." However, I find that Moore's actual statement was the similar, but more benign one, that he testified to at trial.

b. William Hamilton

William Hamilton is a machine operator with the Respondent. He began working for the Respondent in April 1999 and during the relevant time period was assigned to a shift that began at 3 p.m. and was known as the "second" shift. His supervisor was Rick Messer. Hamilton became aware of the union campaign in February and was an active supporter of the Union. In May or June 2000 he began wearing shirts with union insignias at work two or three times a week and at a June meeting he publicly challenged Barefoot about a union charge and the need for a contract. In July or August he helped pass out prounion leaflets.

On July 19, 2000, Hamilton entered the plant at approximately 2:40 p.m., 20 minutes before his shift was scheduled to begin. Second-shift machine operators, including Hamilton, would not infrequently enter onto the production floor a few minutes early to talk to the machine operators on the first shift about work-related matters such as problems with the machines and the projects that were underway. On this particular morning a machine operator, Emanuel Brummit, called Hamilton over to tell him that an employee named Jonathan Hurst had reported on activities by another employee, Stacy Lawson, and that this report had resulted in Lawson receiving a three-day suspension.[11] Hamilton followed Hurst into a tool room that was a hundred yards or more from Hamilton's duty station. Hamilton talked to Hurst for about 5 minutes and, inter alia, asked Hurst why he had "ratted Stacy [Lawson] out." Also before his shift started that day, Hamilton apparently spoke with one or more employees on the typewriter line.

On July 19, Rick Messer was told by his supervisor, Rhonda Davis, that Hamilton had been reported to be talking to employees on the typewriter line and causing a disturbance. Davis and Messer decided to issue a warning to Hamilton for this activity. Messer signed the report of the discipline, which stated that "[w]hen William is reporting to work early he is to stay outside or in the break area until it is time to start work [b]ecause visiting employees is causing a disturbance during working hours." Messer testified that he had not himself seen Hamilton causing a disturbance and that machine operators were actually permitted to enter the work area prior to the start of their shifts to talk to the machine operators from the previous shift.[12]

At the end of Hamilton's shift on July 19, Messer told Hamilton about the discipline, and showed him a copy of the report of the warning, which was signed by Messer. Hamilton responded that he was "not the only one doing it." Hamilton checked a box on the report form indicating that he disagreed with the report.

c. Discipline against other employees

For purposes of comparison, the parties presented evidence regarding other employees who received discipline, or were spared discipline, for engaging in various types of conduct. Steely testified that reports of discipline generally were forwarded to him.

In August 2000, an employee named Stanley Ayers had a dispute with a coworker, Wilma Cobb, about how to perform their work. Ayers went to the office of their supervisor, Steven Lindsey. When Cobb followed Ayers into Lindsey's office, Ayers said "fuck you" to Cobb and left. Cobb complained to Steely about Ayers' statement, and a meeting was held with Steely, Lindsey, Ayers, and Cobb. At this meeting, Steely stated that what Ayers did was an automatic cause for termination.[13] Cobb stated that she did not want Ayers to lose his job. Steely asked Ayers if he would apologize. Although Ayers did not say "I'm sorry" or "I apologize," he did eventually apologize in what Cobb characterized as "a round about way." Ayers received no formal discipline at all.[14]

Another of the Respondent's employees, Brian Powers, was given a "final warning" on October 12, 1999, for signing another employee's name on the sign off sheet. (GC Exh. 6.) On November 1, 1999, Powers received another "final" warning, this time for telling other employees "to slow down on running production." Then Powers, on November 18, 1999, physically tackled a coworker, in the Respondent's parking lot, causing injury to the coworker. Id. For this action, Powers was written up, and was told that he would have to pay any medical expenses that the injured coworker incurred. Id. Finally, on November 23, 1999, Powers was discharged after an episode in which he had a physical fight with another employee in the presence of a supervisor, and then tried to provoke a fight with the supervisor. (R Exh. 3; GC Exh 6.) His termination report stated that he had violated section 15.3, rules 5, 6, 7, 8, and 11. Id.

On February 17, 2000, the Respondent issued a written warning to Tonya Monholland for "using profanity and making lewd comments." (GC Exh. 7.) The report noted that there had been "several" complaints about Monholland from employees and management. These complaints included that Monholland was "doing or saying things to cause disruption." Monholland was neither suspended nor terminated on February 17 for these infractions. (Tr. 85–86.) The Respondent terminated her at a later date for further misconduct. Id.

[11] There was no evidence that the activities that led to Lawson's suspension were related in any way to the Union or the organizing campaign.

[12] There was no first-hand testimony that Hamilton had spoken to people on the typewriter line or caused a disturbance there before the beginning of his shift. Hamilton testified, but his testimony did not specifically address the question of whether or not he had spoken to persons on the typewriter line, or whether he was involved with any disturbance there. Hamilton did testify that he had followed Hurst into the tool room to discuss the Lawson incident, but it was not shown that this was connected to any discussion or disturbance at the typewriter line.

[13] Sec. 15.3, subsec. 5, of the Respondent's manual states that an employee may be subject to immediate discharge for the "use of abusive, profane, lewd, or lascivious language." (See R Exh. 2, p. 32.)

[14] The General Counsel subpoenaed the Respondent's records of all employee discipline for the period from October 1, 1999, to October 31, 2000. (Tr. 78 and 89.) The incident between Ayers and Cobb took place in August 2000, but there was no record of Ayers receiving discipline of any kind for it. I find that Ayers was not disciplined for the profanity uttered to Cobb.

During the union campaign, an employee[15] approached Barefoot and stated that other employees told her she could lose her job for distributing union handbills outside the Respondent's facility, and that she wanted Barefoot to know that she was not doing so. Barefoot described the woman as being "upset with tears in her eyes." Barefoot said that he approached the two people who the woman said had threatened her, but that both of them denied the allegation. According to Barefoot, he was "very forceful" with them, and stated that if they threatened employees about the union they would be discharged. However, the Respondent did not issue any discipline to either of these individuals. Barefoot explained that it was just "her word against theirs."

On July 13, 2000, the Respondent issued a written warning to Michael Richardson for "leaving his work station too often." The warning stated that Richardson had been caught several times wandering around in different areas away from his work station." (R Exh. 9.) Similar conduct resulted in a written warning for Jeanetta Earls. The report on Earls' warning states that she was, inter alia, visiting with other employees during worktime. (R Exh. 7.)

Vester McFarland, an employee who, like Hamilton, worked under the supervision of Rick Messer, was issued a warning report on July 26, 2000. The report states: "Vester McFarland was informed by a supervisor not to be on the floor before his time to start work. I told him if he arrives at work early he is to wait in the break area." (R Exh. 8.) The report was signed by Messer, who also signed the July 19 report warning Hamilton not to be on the floor before it was time to start work. McFarland was known as an opponent of the organizing campaign.

B. The Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act on about March 21, 2000, when Walker and Barefoot threatened employees that the Respondent would close the facility if the union campaign was successful.[16] The complaint further alleges that the Respondent violated Section 8(a)(1) on about June 9, 2000, when Barefoot informed employees that the Respondent would never sign a collective-bargaining agreement, and dared employees to say that Walker had threatened employees with plant closure after Barefoot told them that Walker had not made such a threat. In addition, the complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily suspending and then discharging Moore because he had engaged in union or protected concerted activities, and by issuing a warning to Hamilton because he had engaged in union or protected concerted activities.

[15] This employee was not identified by name in the record.

[16] The complaint did not originally allege that Barefoot made such a statement. At trial the General Counsel moved to amend the complaint to add paragraph 5(c), alleging that on "about March 21, 2000, Respondent, by Bill Barefoot, at its Williamsburg, Kentucky facility threatened employees that Respondent would close the facility if the Union came successfully." The Respondent did not object to the General Counsel's motion to amend, and I granted it. I also granted the Respondent's request to amend its answer to deny the new allegation.

III. ANALYSIS AND DISCUSSION

A. Barefoot's and Walker's Statements at March Meetings

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees" in the exercise of their rights under section 7 of the Act. 29 U.S.C. Sec. 157. An employer may not make threats of reprisal, but has the right to express its view regarding unions. Section 8(c), 29 U.S.C. Sec. 158(c). The employer's statements to its employees about their organization activities must be "'carefully phrased on the basis of "objective fact to convey [its] belief as to demonstrably probable consequences beyond [its] control."'" *AP Automotive Systems*, 333 NLRB No.68, slip op. at 1 (2001) (quoting *Gissel Packing Co.*, 395 U.S. 575 (1969)).

In his presentation, Barefoot stated that if the employees unionized there would be "no more TCA." He told employees that when he was a vice president at Proctor Silex, and the employees at a unionized plant rejected the company's contract offer, "we started moving the plant," and "[i]t took us just 60 days" to transfer the work to another factory. Barefoot named four unionized companies from the area that had either closed or reduced their work forces dramatically, and he urged employees to ask themselves if the Union had "the ability or the resources to offer you continuous employment." For his part, Walker stated that companies, not unions, were the ones who provided jobs. Walker stated that when he worked for another company with a union, there had been a protracted strike and the company had closed the plant at his recommendation. He discussed three unionized facilities that were all gone from the area, and a forth one that had downsized dramatically, and noted that that the unions had not protected the jobs of workers at those facilities. He stated that if the union campaign were successful, the Respondent would "depart" and would "not exist in Williamsburg."

The statements by Barefoot and Walker were "calculated threats," not statements regarding the organizational activities that were carefully phrased on the basis of objective fact to convey the Respondent's belief as to demonstrably probable consequences beyond its control. *AP Automotive Systems*, 333 NLRB No.68, slip op. at 1. Statements of the types made to employees by Barefoot and Walker have consistently been found to violate the Act. For example, in *Overnite Transportation Co.*, 296 NLRB 669, 670 (1989), enfd. 938 F.2d 815 (7th Cir. 1991), the Respondent was found to have violated section 8(a)(1) when it "referred to specific [companies in the same field] that had closed after becoming unionized" and stated that the company "would close its doors if its employees voted for the Union." The Board noted that such statements "'equate unionization with unprofitability, loss of jobs, and business closing—not on the basis of objective fact or probable consequences beyond the Respondent's control, but rather as calculated threats during the course of an intensive antiunion campaign.'" 296 NLRB at 670 (quoting *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988)). These statements "unlawfully threatened that the employees would lose their jobs if they selected the Union as their collective-bargaining representative." 296 NLRB at 670. Similarly, in White *Plains Lincoln Mercury*, 288 NLRB 1133, 1135 (1988), the Board found that the

employer violated section 8(a)(1) in a letter that: stated "we don't need the union and neither do you;" listed 19 employers in the area that had gone out of business; stated that the union cannot give "job security;" and stated that the union could "force [the company] out of business" and "cost you your job." See also *AP Automotive Systems*, 333 NLRB No. 68, slip op. at 1, and *Laser Tool, Inc.*, 320 NLRB 105, 111 (1995).

If anything, the statements by Barefoot and Walker in this case are more threatening and coercive than those at issue in *Overnite Transportation* and *White Plains Lincoln Mercury.* Not only did Barefoot and Walker tell employees that the plant would cease to exist and depart if the Union campaign succeeded, but lest employees view these as idle threats, both speakers recounted that they had personally participated in closing unionized plants in the past.

The Respondent does not argue that the statements that I find Barefoot and Walker made do not constitute threats of reprisal in violation of Section 8(a)(1). Rather the Respondent argues that Barefoot did not say that there would be "no more TCA" and that Walker did not say that the Respondent would "depart" and would "not exist in Williamsburg." The Respondent contends that the remarks that Barefoot and Walker admitted to making were expressions of opinion and experience and are lawful pursuant to Section 8(c).[17] Respondent contends that I should credit Barefoot's and Walker's denials that they told employees the plant would cease to exist or depart because, inter alia, the Respondent had requested advice from counsel about how to lawfully respond to the organizational effort, Barefoot's and Walker's notes of the meeting were consistent with their denials, and both Barefoot and Walker gave detailed testimony. Respondent argues that the contrary testimony of the General Counsel's witnesses was inconsistent and lacking in detail, and should not be credited. I have considered the Respondent's contentions, but for the reasons discussed previously I have concluded that the General Counsel's witnesses were more credible than the Respondent's witnesses on the subject of whether Barefoot and Walker made the threats of plant closure.[18]

I conclude that Barefoot and Walker each made threats of plant closure at the general meetings in March 2000 in violation of Section 8(a)(1) of the Act.

B. Barefoot's Statements at June Meeting

At the June meeting, Barefoot discussed charges that the Union had filed against the Respondent. He told the employees present that that Walker had not said the plant would close if the union came in, and that people had just heard what they wanted to hear. Hamilton responded that he and others had heard Barefoot say that the plant would depart. Then Barefoot stated that he "dared" others to step forward and say that they had heard Walker say the plant would close.

I conclude that when Barefoot dared employees to come forward and support the allegation regarding Walker's threat of plant closure, Barefoot coerced and interfered with employees in the exercise of their Section 7 rights and violated Section 8(a)(1). The use by the company's president of the term "dare" in this context implies that any employee who reported that Walker made such statements would be exposing himself or herself to risk. An employee who heard Walker threaten plant closure could reasonably be fearful to step forward when just moments before the Company's president had publicly had stated that Walker had not done so. Barefoot's statement could also tend to chill employees' participation in subsequent proceedings regarding the allegation. I conclude that Barefoot violated Section 8(a)(1) by daring employees to step forward and contradict his statement that the allegation was false.[19]

Even if one views Barefoot's statement as an argumentative way of asking whether anyone else had heard Walker threaten plant closure, that question would be unlawful given the circumstances present here. Employers are permitted to ascertain "necessary facts" from employees concerning issues raised in a complaint, but "the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation." *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). The employer must, inter alia, "communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature." *Johnnie's Poultry*, 146 NLRB at 775. Failure to comply with these safeguards violates the Act, irrespective of the employer's intent to coerce, the extent of the questioning, or the number of employees questioned. *Kyle & Stephen, Inc.*, 259 NLRB 731, 733 (1982); *Standard-Coosa-Thatcher, Carpet Yarn Division*, 257 NLRB 304 (1981), enfd. 691 F.2d 1133 (4th Cir. 1982), cert. denied 460 U.S. 1083 (1983). In the instant case, not only did Barefoot do nothing to assure employees that no reprisals would take place, or otherwise make sure that the context was not coercive, but by "daring" employees to publicly come forward and contradict him, he actively created a coercive context. Barefoot's "question" to the employees was

[17] "Section 8(c) permits employers truthfully to describe their experiences with unions, so long as the communications 'do not contain a "threat of reprisal or force or promise of benefit."' *Atlantic Forest Products*, 282 NLRB 855, 861 (1987) (quoting *Gissel Packing Co.*, 395 U.S. 575, 618 (1969)).

[18] Although I do not credit Barefoot's or Walker's denials that they said the plant would close, I have credited some other aspects of their accounts of the meetings. See *American Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997) ("A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says."), enforcement granted in part, denied in part 164 F.3d 867 (4th Cir. 1999); *Excel Containers, Inc.*, 325 NLRB 17 fn. 1 (1997) (nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony).

[19] The Respondent contends that the General Counsel is arguing that "an employer's denial of an allegation of an unfair labor practice is itself an unfair labor practice" and that such a theory is a "direct affront to Section 8(c) of the Act." R. Br. at 17. I do not disagree that Barefoot would have been within his rights if, at the meeting, he had simply denied the allegation in one or more of the charges. However, Barefoot did more. After denying the allegation, Barefoot went on to challenge employees to come forward, and issued this challenge using intimidating language that a reasonable employee was likely to find threatening.

not attended by several of the necessary safeguards and violated Section 8(a)(1) of the Act.

I also conclude that Barefoot violated Section 8(a)(1) at the meeting by stating that the Respondent would not agree to a contract. The Board has consistently held that an employer violates the Act by implying to employees that supporting the Union would be futile since the Respondent would not agree to a contract. See *Pacific FM, Inc.*, 332 NLRB No. 67 (2000); *Hedaya Bros., Inc.*, 277 NLRB 942, 957 (1985); *Tube-Lok Products*, 209 NLRB 666, 669 (1974), enfd. 94 LRRM 2368 (9th Cir. 1975).

C. Suspension and Discipline of Moore

The Respondent does not dispute that Moore was suspended and discharged for statements made to a coworker during a discussion about the merits of the union campaign. It is clear that his discharge was directly attributable to conduct that was part of the res gestae of Moore's union and protected concerted activities; i.e., his discussion with a fellow employee regarding the merits of the Union.[20] In such circumstances, the Board "has long held that, in order for discipline arising therefrom to be privileged, the misconduct at issue must be so flagrant or egregious as to warrant the removal of the Act's protection from the employee's otherwise integrally related protected union and concerted activities. *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982), enfd. 711 F.2d 1059 (6th Cir. 1983); see also *McCarty Foods, Inc.*, 321 NLRB 218 (1996) (employee's "alleged 'harassment of fellow employees" about union cards was "protected union activity"). The burden is on the Respondent to show that Moore's statement removed him from the protections of the Act. n*LRB v. Burnup & Sims*, 379 U.S. 21, 23 and fn. 3 (1964)

As found above, Moore's statement to Draper was "I hear that . . . if the Union was voted in and the cards was passed out and you didn't sign one, you was fired." I conclude that this statement, even to an employee who had stated that he would not sign a union card, was not so flagrant or egregious as to remove Moore from the protections of the Act. As noted above, Moore was simply reporting what he had heard from his relatives. Moore did not indicate that he had the capacity to have Draper fired, or even suggest that he would have any inclination to do so if he did have the capacity.[21] Nor did Moore pressure Draper to support the union *before* the election by telling him he had to sign a union card *now*, or risk discharge *after* the union came in. Indeed, Moore's message was not dissimilar to the one communicated by Walker when he told employees that at unionized plants workers who did not pay union dues or assessments could be fired. Walker admitted that he told employees this, and the Respondent states that Walker's remarks were lawful.

As discussed above, the management witnesses claim that Moore admitted that he made the somewhat more threatening statement to Draper that if "an employee did not sign a union card, and the Union came in that the employee could be fired." See supra footnote 10. I found that Moore did not make that statement, but would not rule out the possibility that, due to a misunderstanding, the Respondent believed that Moore had. However, it is not at all clear that even if Moore had said what the Respondent claims he said, such a statement would remove Moore from the protections of the Act. The Respondent's version of the statement is on a par with the one made by the prounion employee in *Liberty Nursing Homes, Inc.*, 245 NLRB 1194, 1202 (1979), who told an antiunion employee that "if you don't vote yes for this Union and I do, and they are voted in, and you do something I don't like, I can go over your head and have your fired." The administrative law judge in that case, in a decision that was affirmed by the Board, characterized the statement as being more in the nature of an argumentative misrepresentation than a threat. Id. at 1203.

Even if I were to find that the Respondent believed, erroneously but in good faith, that Moore had a made a remark sufficiently egregious to deprive Moore of the Act's protections, that would not render the Respondent's decision to terminate Moore lawful. When an employee is disciplined for an alleged violation of a lawful rule while engaging in protected activity the employer is not privileged to act on a reasonable belief if, in fact, the employee is innocent of wrongdoing. *Avondale Industries*, 333 NLRB No. 74, slip op. at 18 (2001) (citing *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 (1990), and *NLRB v. Burnup & Sims*, 379 U.S. 15 (1992)). In this case, the statement that I find Moore actually made was not threatening, and was certainly not so egregious or flagrant as to deprive Moore of the Act's protection. Therefore, regardless of what the Respondent believed, the Respondent's termination of Moore was unlawful since Moore was, in fact, innocent of saying anything that deprived his union activity of the Act's protection.

During organizational campaigns, especially heated ones, a certain amount of misunderstood, misheard, or just plain wrong information, is likely to be discussed among employees. To find that a statement like Moore's removes a conversation about the Union from the Act's protection would unnecessarily inhibit employees' ability to freely discuss, debate and consider the question of union representation. As was noted in Liberty House Nursing, the realities of employee dialogue during organizing campaigns "impose a standard of prudent judgment upon employers before harshly treating . . . every employee who makes an untoward statement." 245 NLRB at 1203. In the instant case, the Respondent not only did not act with such "prudent judgment," but punished Moore unusually harshly even by its own standards. Moore was a good employee, without prior discipline, who was quick to apologize when the Respondent told him that it considered his statement to Draper an unacceptable threat. Yet Moore was terminated for his first

[20] Since the explicit subject of the conversation was the merits of the Union, it is plain that Moore was engaging in union activity. I also conclude that he was engaged in protected concerted activity. As the General Counsel correctly notes in its brief, Moore, by discussing the Union with a coworker, was taking steps towards group action and the fact that Draper was not receptive does not deprive the discussion of its concerted character. See GC Br. at 10 (citing *Whittaker Corp.*, 289 NLRB 933, 934 (1988)); see also *Liberty House Nursing Homes*, 245 NLRB 1194, 1202 (1979) ("discussion between a prounion employee and an employee whose sympathies lay elsewhere" "constituted protected concerted activity").

[21] There was no evidence that Moore was a union official or that the Union had any knowledge that he was initiating conversations about the organizing campaign.

offense. On the other hand, the Respondent did not discharge or even suspend Brian Powers when he physically assaulted another employee in the company's parking lot, despite the fact that Powers had twice previously been given "final warnings" for misconduct. The Respondent did not issue any discipline at all to Stanley Ayers for saying "fuck you" to a female employee during a dispute in front of a supervisor. Tonya Monholland used profanity and made lewd comments and was not suspended or terminated even though there had been several complaints about her behavior. These offenses, like Moore's, fell within the general category of infractions for which the Respondent's employees "may" be subject to immediate discharge pursuant to its employee handbook, however, only Moore was terminated for the first offense.[22] In another case, an employee came to Barefoot with "tears in her eyes," and complained about antiunion threats. After the two employees denied the allegation, the Respondent took no disciplinary action at all. Against this background, the harsh nature of the discipline invoked for Moore "would serve as a signal to employees that the Employer would look with little compassion upon those who engaged in even trivial forms of misconduct in the course of their prounion activity." *Liberty House Nursing Homes*, 245 NLRB at 1203.

I conclude that the Respondent suspended and then terminated Moore because of his protected union activity. The statements he made during the course of those activities were not so egregious or flagrant as to deprive Moore of the protections of the Act. Therefore, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending and terminating Moore.

D. Warning Issued to Hamilton

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or protected activity. Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's actions were motivated, at least in part, by anti-union considerations. The General Counsel meets this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB No. 154, slip op. at 6 (2000); *Regal Recycling, Inc.*, 329 NLRB No. 38, slip op. at 2 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, supra, slip op. at 6. [23]

The Respondent does not dispute that Hamilton engaged in protected union activity and that it knew of such activity. Hamilton testified without contradiction that he was the first of the Respondent's employees to begin wearing prounion shirts to work and that he did so two or three times each week starting in May or June 2000. At the meeting that Barefoot had with Hamilton and other employees in June 2000, Hamilton voiced belief in the validity of one of the unfair labor practice charges that the Union filed against the Respondent, and also told Barefoot that the employees wanted a contract with the company. Thus Hamilton was publicly proclaiming his support for the Union and its activities to management officials and others prior to the discipline of July 19, 2000. I conclude, that Hamilton engaged in protected union activities prior to the discipline, and that the employer was aware of these activities. I also conclude that the employer harbored animosity towards the Union and union activity. This is demonstrated most obviously by the threats of plant closure made by Barefoot and Walker, and by Barefoot's statement that the Respondent would not enter into a collective bargaining agreement. I conclude the General Counsel has met its initial burden.

Since the General Counsel has met its burden, the burden shifts to the Respondent to show that it would have taken the same disciplinary action absent Hamilton's protected activity. I find that the Respondent has met its burden in this case. The Respondent states that it issued the warning because Hamilton went onto the production floor prior to the start of his shift and visited other employees who were working and caused a disturbance. On the day in question, Hamilton arrived at work 20 minutes prior to the start of his shift and followed employee Jonathan Hurst into a tool room that was 100 yards or more from Hamilton's duty station in order to challenge Hurst's actions regarding an incident that is not alleged to relate to union activity. However, the evidence showed that Vester McFarland, an employee who opposed the Union, also received a warning for going out onto the floor prior to the start of his shift. Two other employees, Michael Richardson and Jeanetta Earls were issued warnings for wandering away from their work stations, although in their cases they did this while on duty. Based on this evidence regarding comparable discipline, I conclude that Hamilton would have received a warning for his actions on July 19, regardless of his protected activity.

The General Counsel points out that arriving early to work was a common practice and not uniformly prohibited by the Respondent. The evidence did indicate that machine operators not infrequently entered onto the floor before the start of their shifts and were not disciplined. However, these employees arrived early to talk to the machine operators who they were relieving about such matters as problems on the machines and

[22] In the Respondent's "Employee Policy Handbook," the infraction for which Moore was discharged fell under Section 15.3—the general category of violations "for which an employee *may* be subject to immediate discharge." R Exh. 2, pp. 32-34 (emphasis added). The infractions that resulted in lesser discipline for Powers (assault), Ayers (use of abusive, profane, lewd or lascivious language), and Monholland (use of abusive, profane, lewd, or lascivious language), are also within the general category of offenses that "may" be subject to immediate discharge. Id.

[23] The *Wright Line* analysis applies in the case of discipline that, like that issued against Hamilton, is not explicitly for conduct that occurred during protected activity. The Respondent's discipline against Moore was explicitly based on comments made in the course of protected activity, and therefore a different analytic framework was applicable.

the projects for the day. There was no evidence that lesser discipline was issued to any other employee who, prior to his or her shift, proceeded to a location on the production floor far from his or her work station in order to air a dispute unrelated to job duties. I conclude that the Respondent has met its burden of showing that Hamilton would have received a warning for his conduct even if he had not engaged in protected union activity. Therefore, I will recommend that the complaint allegation involving Hamilton's discipline be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act: by threatening employees that the Respondent would cease to exist if they became unionized; by threatening employees that the Respondent would "depart" if they became unionized; by threatening employees that the Respondent would "not exist in Williamsburg" if they became unionized; by "daring" employees to come forward and contradict the Respondent's denial of an unfair labor practice allegation; and by stating to employees that it would not sign a collective bargaining agreement.

3. The Respondent violated Sections 8(a)(1) and (3) of the Act by discriminatorily suspending and discharging Robert Moore because of his union and protected activities.

4. The Respondent did not commit the unfair labor practice alleged when it issued a warning to William Hamilton.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Tri-County Manufacturing and Assembly, Inc., Williamsburg, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that the Respondent would cease to exist, would depart, or would not exist in Williamsburg, or with related reprisals, if they became unionized.

(b) Stating to employees that it would not sign a collective bargaining agreement.

(c) Daring employees to come forward and state facts in support of an unfair labor practices charge, or otherwise coerce or intimidate employees who may have information regarding an unfair labor practices charge.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Robert Moore full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Robert Moore whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter notify Robert Moore in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its facility in Williamsburg, Kentucky, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 20, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 7, 2001

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[25] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Steel Workers of America, AFL-CIO,CLC, or any other union.

WE WILL NOT threaten our employees that the Company will cease to exist, depart, or not exist in Williamsburg, or with related reprisals, if they became unionized.

WE WILL NOT tell our employees that we will never sign a union contract.

WE WILL NOT dare employees to come forward to state facts in support of an unfair labor practices charge, or otherwise coerce or intimidate employees who may have information regarding an unfair labor practices charge.

WE WILL, within 14 days from the date of the Board's Order, offer Robert Moore full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Moore whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Robert Moore, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

TRI-COUNTY MANUFACTURING AND ASSEMBLY, INC.